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FILED
FEB 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1963

No. 632

JAMES E. HARRIS,
Plaintiff in Error

versus

NORFOLK SOUTHERN RAILWAY,
A CORPORATION
Defendant in Error.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

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Law Building
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Your petitioner, James E. Harris, respectfully prays for a rehearing of the order entered on January 13th, 1964 denying his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

HARD CASES SHOULD NOT MAKE BAD LAW, BUT HARD CASES DO AND SHOULD MAKE THE COURTS VIGILANT TO DISCOVER AND PURSUE A MODE BY WHICH, WITHOUT DOING VIOLENCE TO ESTABLISHED LAW AND FORMS OF PROCEDURE, THE WRONG MAY BE REDRESSED. 1

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1. Spillman, Adams & Co. v. Gilpin, 93 Va. 702.

The opinion further states:

> *"The discretion (of the court in determining whether or not it should grant a rehearing) thus exercised is, of course, a judicial discretion and one not to be exercised arbitrarily, either in granting or withholding the relief sought."*

I. Fifteen thousand ($15,000.00) Dollars for a lifetime permanent one hundred (100%) per cent mental disability.

II. Four (4) doctors — with none in disagreement — state that it is a one hundred (100%) per cent permanent mental disability.

III. Uncontradicted evidence of four (4) doctors to no doctors.

How would a jury know how to apply the facts without knowing what the law is?

The United States Court of Appeals for the Fourth Circuit, 319 Fs 2d, 493, *in its majority opinion, admitted*.

> "... the sufficiency of the charge on the question of damages, for the charge in that respect is far from a model of completeness."

The opinion further states:

"Nevertheless, it should have served as a reminder

to the court of the appropriateness of instructions which would have more adequately pointed up the principal issue at the trial, the connection, or lack of connection, between the plaintiff's physical and emotional infirmities and the injury he suffered in 1957. That issue would have been illumined had the court marshaled the evidence for the jury, and, in that connection, referred to the well-established principle that the tort-feasor is liable for all of the damages sustained as a result of the physical injury he inflicts, though, because of some latent infirmity, or pre-existing condition, the nature and extent of the damages proximately flowing from the injury were unusual or even unforeseeable at the time the injury was inflicted. If such instructions were given, however, the court, in fairness, should have gone further to clearly and unequivocally instruct the jury that they should not include their damage award to the plaintiff anything on account of the plaintiff's troubles with his wrist, if it found that those troubles were the result of congenital and traumatic malformations of the bones existing before the plaintiff was struck by the piece of steel, and the blow was not an aggravation of the pre-existing condition. The question then is whether, in the absence of some balanced enlargement of the instruction actually given, it can be said that in all likelihood the jury was misled, or that the court's guidance was so deficient that there well may have been a miscarriage of justice."

The majority further stated:

"When the difference between the parties had

been so clearly limited to this one principal narrow area of factual disagreement, *the absence of full and complete instruction on tangential legal questions was not fatal, though, under other circumstances, their absence might have resulted in an unfair submission.*" (Underlining ours)

The minority opinion by Judge J. Spencer Bell states:

"... *The majority concedes the failure of the charge properly to marshal the evidence on this issue for the jury.* On this point, plaintiff's counsel objected and tendered an instruction to the court, thus bringing squarely to the court's attention the inadequacy of the charge. The fact that the issue was drawn to the jury's attention by counsels' fight to include or exclude evidence on the issue instead of excusing the inadequacy of the charge, only compounds it."

"... Error in a charge need not be by a direct misleading of the jury; it may be, as I think it was in this instance, from a neglect and refusal to lead the jury on the chief issue. In the absence of an adequate charge, we have no right to speculate on whether or not the jury was misled. A charge which correctly gives an abstract statement of the law, but which does not apply the law to the facts of the case, is misleading and prejudical. Cf. Lachman v. Pennsylvania Greyhound Lines, 160 F. 2d 496 (4 Cir. 1947)."

The court's attention is brought to the error of the petitioner for a writ of certiorari, on Page 36, wherein it

appears that the case was decided by three District Judges. The case was heard by two Circuit Judges, the Honorable Clement F. Haynsworth, Jr. and the Honorable J. Spencer Bell, with one District Judge, the Honorable L. Richardson Preyer, and with the result that the two Circuit Judges disagreed, with one for affirming the judgment and Judge Bell dissenting, and the District Judge in favor of affirming the judgment of the District Court.

If the doctors are right, and the court below is correct in its finding that the charge was not proper, would it not be a miscarriage of justice to permit a judgment of Fifteen Thousand ($15,000.00) Dollars to stand for the lifetime one hundred (100%) per cent mental disability of Harris?

Petitioner prays that the order of this court denying his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be reheard and vacated, and that the petition be granted.

JAMES E. HARRIS

By

LOUIS B. FINE

Of Counsel for Petitioner

HOWARD I. LEGUM

Of Counsel for Petitioner

Certificate of Counsel

The undersigned, Louis B. Fine, of counsel for petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in Rule 58, and that said petition for rehearing is not interposed for delay.

I do further certify that I mailed a copy of said petition for rehearing to Messrs. Worthington, White and Harper, 900 Plaza One, Norfolk, Virginia, on this 23rd day of January, 1964.

LOUIS B. FINE

Of Counsel for Petitioner